IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 597 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GAMJI GILU RATHWA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PT JASANI for Appellant(s) : 1,MR MP SHAH for Appellant(s) : 1,MS. KRUTI M SHAH for Appellant(s) : 1,
MR HL JANI, ADDL PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 02/02/2007

ORAL JUDGMENT

1. The appellant-original accused in Sessions Case No. 43 of 1989 is before this Court being aggrieved by judgment and order dated 20.6.1992 passed by the learned Additional Sessions Judge, Vadodara, camp at Chhota Udepur.

The learned Additional Sessions Judge was pleased to convict the appellant for an offence under Section 304 Part-II and was pleased to sentence him for three years' simple imprisonment, fine of Rs. 1,000/- and, in default, six months simple imprisonment.

2. The incident is alleged to have taken place on **01.05.1989**. The case of the prosecution is that appellant- Gamji Gilu, who was aged less than 21 years at the time of incident, had inflicted a blow with 'stick' (dang) on the head of the father of the complainant. His younger brother Sunji Gilu had also inflicted a blow with a 'Vanchhi' with blunt portion on the neck of the deceased.

Learned advocate Ms. Kruti M. Shah for the appellant invited attention of the Court to the depositions of the following witnesses:

PW NOS.	NAME OF THE WITNESSES	EXHIBIT NOS.
01	Vajliben (daughter of the deceased)	08
03	Himto (son of the brother of the deceased)	12
04	Kurkan, who turned hostile, (son of the brother of the deceased)	13
05	Jondu, who too turned hostile,	14
06	Vechat, who was police Patel of the village and who also did not support the case of the prosecution	15

PW NOS.	NAME OF THE WITNESSES	EXHIBIT NOS.
07	Changaliben (wife of the deceased)	16
08	Ramesh Moti.	17
09	Bhana Ratan (son of the brother of the deceased) who is a witness to panchnama	18
10	Mugu Meghla, who is also a witness to a panchnama of the scene of offence	20
11	Gosla Nanka, who is also a witness to a panchnama for production of weapons	22
12	Kantilal P. Panchal, who initially started the investigation	23
13	Shri Desai-Assistant Police Inspector.	28

The learned advocate for the appellant invited attention of the Court to the following documents:

Serial Nos.	Documents	Exhibit Nos.
01	Charge	04
02	Complaint	09
03	Panchnama of the scene of offence	21
04	Inquest panchnama	19

3. After inviting attention of the Court to the discrepancies in the material evidence of the so-called eye witness to the incident, namely PW 1 Vajliben, daughter of the deceased, and Himto (son of the brother of the deceased) PW 3, who, according to

the case of the prosecution, were present when the blow was inflicted on the deceased by the present appellant and also by his younger brother, the learned advocate for the appellant submitted that the brother of the appellant was tried as a juvenile offender and is acquitted of the offence.

The learned advocate submitted that, taking into consideration the facts of the case, the learned Additional Sessions Judge, Vadodara, who, initially, charged the appellant for an offence under Section 302 of the Indian Penal Code, convicted him for an offence under Section 304 Part-II of the Indian Penal Code.

4. The learned advocate for the appellant submitted that, if it finds favour with the Court, the case of the appellant be considered under Section 6 of the Probation of Offenders Act, 1958. The learned advocate submitted that the appellant was admittedly below 21 years of age at the time of occurrence of the offence and he is convicted for an offence under Section 304 Part-II of the IPC, which is not punishable with imprisonment for life, taking into consideration the fact that the incident had taken place on 1.5.1989 and since then no other offence is registered against the appellant, who belongs to the tribal community, having no education and is living in a remote area, which is away from the main stream of the Country.

The learned advocate for the appellant kept present the appellant. On inquiry about his age, the

appellant is not able to state the same, even his aged father who is with him, when inquired about the age of his son- the appellant, he replied that, 'the Court may assess the age of the appellant, he is only concerned with the fact that his son is doing agricultural labour work and is maintaining his wife and minor child aged 5 years'.

This reply of the father of the appellant is reproduced so as to appreciate the educational, economical and social background of these persons. Even remotely they cannot be said to be aware of the so-called progress made by the country after so many years of the independence. It is apparent that they are living in a remote area inhabited by the tribal community and are not aware about the modern society.

5. The learned advocate for the appellant relied upon a decision of the Hon'ble the Apex Court in the matter of **Mohammad alias Biliya Vs. State of Rajasthan** reported in **(2000) 10 SCC 486. T**he Hon'ble the Apex Court was pleased to extend the benefit of Probation of Offenders Act, 1958 flowing from Section 6 in the case wherein the appellant was convicted for an offence under Section 304 Part-II. The learned advocate for the appellant submitted that,in the case before the Hon'ble the Apex Court, also, the appellant was aged less than 21 years at the time of occurrence and was initially charged under Section 302 of the Indian Penal Code and was convicted under Section 304 Part-II and was sentenced to undergo four years' imprisonment. The learned advocate submitted that the

Hon'ble the Apex Court was pleased to order the release of the appellant on probation on execution of a bond to the satisfaction of the Magistrate concerned for a period of two years.

The learned advocate submitted that, in the present case, the incident is of 1989 and long 18 years have passed. During this period, no other offence is registered against the present appellant. The learned advocate submitted that this itself certifies the character of the appellant.

The learned advocate submitted that, taking that into consideration, a similar treatment be accorded to the present appellant.

6. Learned APP Mr. H.L. Jani made available jail record of the present appellant, which shows that the appellant has undergone four months and 21 days' imprisonment.

7. Taking into consideration the fact that the appellant was below 21 years of age at the time of occurrence of the offence and the fact that the offence had taken place more than one and half decade before, the Court deems it fit to extend the benefit under Section 6 of the Probation of Offenders Act. The Court also deems it fit to dispense with the execution of the bond in the peculiar facts and circumstances of the case, viz. the offence was committed 18 years before and for all these 18 years, though he was on bail, no other criminal offence is registered against

him and, therefore, he is extended the benefit of the Probation of Offenders Act.

Accordingly, the appellant -original accused is directed to be released on probation of good conduct for a period of one year, to appear and receive sentence as and when called upon during the period of one year. Conviction is maintained and sentence is quashed. The Criminal Appeal is allowed.

Sd/-

(RAVI R. TRIPATHI, J.)

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